BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL D. CLARK	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,027,409
	)	
SEDGWICK COUNTY	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requests review of the August 21, 2006 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

At the preliminary hearing held in this case on April 6, 2006, compensability of the claim was denied by respondent. On April 10, 2006, the Administrative Law Judge issued an Order referring claimant to Dr. Stein for an independent medical examination to determine the causation of claimant's back complaints. Neither party requested Board review of that Order. After receipt of Dr. Stein's report, the parties held a status conference with the ALJ. A record was neither requested nor made of the status conference. On August 21, 2006, the ALJ then issued an Order designating Dr. Do the claimant's authorized treating physician.

The respondent requests review of the August 21, 2006 Order and raises the issue whether the claimant's accidental injury arose out of and in the course of employment.

Claimant argues the respondent failed to timely appeal the April 10, 2006 Order which claimant contends determined the compensability issue. Claimant further argues the August 21, 2006 Order simply designated a treating physician which does not raise a jurisdictional issue for Board review. Moreover, claimant argues the respondent's appeal should be dismissed due to failure to allege that the ALJ exceeded his jurisdiction in granting relief as required by K.S.A. 44-551(b)(2)(A).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Initially, claimant argues that respondent did not timely appeal the April 10, 2006 Order which claimant further argues determined the issue of compensability of the claim. Although it is undisputed that respondent did not request Board review of the ALJ's April 10, 2006 Order, it is disputed whether that order determined the compensability issue.

After the April 6, 2006 preliminary hearing the ALJ issued the April 10, 2006 Order which provided:

> Dr. Stein is requested to perform an Independent Medical Examination on behalf of the Court for causation of Claimant's back complaints, either work related, golf related, or some other activity or process.[1]

The ALJ's written Order simply appointed a doctor to conduct an independent medical examination of claimant and then address the specific issue whether claimant's condition is causally related to his work. The order did not address claimant's request for preliminary hearing benefits as it only addressed the independent medical evaluation.

It is not uncommon for the workers compensation judges to take preliminary hearing requests under advisement while waiting for independent medical evaluations. The Act gives the workers compensation judges the authority to obtain independent medical evaluations to assist them in their decisions. When ordered, such evaluations shall be considered by the judges.[2] Judge Klein did not specifically announce that he was taking claimant's request for preliminary hearing benefits under advisement until receiving Dr. Stein's report, but as a practical matter that is what occurred. Although it is much preferred that the Judge make such announcements either on the record or in writing, nonetheless, the plain language of the April 10, 2006 Order leads to no other conclusion. Consequently, the April 10, 2006 Order did not determine the compensability of the claim.

The ALJ's decision to have an independent medical examination performed on the claimant is interlocutory in nature and made during the litigation of a workers compensation case pending before the ALJ. This is not a final order that can be reviewed pursuant to K.S.A. 44-551. Neither is this an order entered pursuant to the preliminary hearing statute K.S.A. 44-534a, as preliminary hearing orders are limited to issues of furnishing medical treatment and payment of temporary total disability compensation. The April 10, 2006 Order pertained to an interlocutory matter, ordering an independent medical examination, over which an ALJ has authority to order during the litigation of the case.

Complying with the Judge's request, Dr. Stein prepared a report, which was filed with the ALJ on June 12, 2006. The doctor's report reflects that copies were also mailed to the parties' attorneys. The ALJ then conducted a status conference with the parties on

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[1] ALJ Order (Apr. 10, 2006).

[2] K.S.A. 44-516.

July 19, 2006. There is no indication that a record was requested by any party at that time. It appears from the arguments in the parties' briefs to the Board that the court-ordered independent medical examination was discussed. In addition, there is no stipulation by counsel concerning the substance of the evidence, arguments or testimony, if any, offered to the ALJ at the status conference.

The ALJ's August 21, 2006, Order provided:

> Dr. Do is the authorized treating physician for all treatment tests and referrals except referrals to rehabilitation hospitals.[3]

Implicit in the August 21, 2006 Order is a finding that the claim is compensable. The respondent timely requested Board review of that Order and raised the issue whether claimant met his burden of proof that he suffered accidental injury arising out of and in the course of his employment. That is an issue that the Board has jurisdiction to review from a preliminary hearing.[4] In summary, the April 10, 2006 Order did not determine the compensability of the claim as it was an interlocutory order for an independent medical examination for a causation opinion. The August 21, 2006 Order to provide medical treatment implicitly found the claim compensable and a timely appeal was filed. Accordingly, there is Board jurisdiction to determine whether claimant met his burden of proof to establish whether he suffered accidental injury arising out of and in the course of his employment.

The claimant was employed as a civil process deputy for the Sedgwick County Sheriff's Department. He was assigned a vehicle and served civil papers on individuals and businesses throughout Sedgwick County. Claimant began to experience upper back pain between his shoulder blades which he initially attributed to a bucket seat in a new vehicle he was assigned. In approximately February 2005 claimant's back pain worsened and he began taking aspirin and Ibuprofen on a daily basis. Claimant also obtained muscle relaxer medication from his personal physician.

Claimant still thought it was the car seat in his assigned vehicle that was causing his back pain so he tried using pillows in the car to alleviate his pain. When that failed, in October 2005 claimant requested a different car and was provided a Dodge which had a bench seat. Claimant also sought chiropractic treatment for his upper back pain. Claimant noted that the pain between his shoulder blades improved when he was off work but returned and worsened when he would return to work, especially as he would twist to get in and out of his vehicle. Finally his personal physician referred claimant for an MRI which

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[3] August 21, 2006 Order.

[4] See K.S.A. 44-534a(a)(2).

revealed a bulging disk at T9-10. A series of facet joint injections as well as an epidural injection failed to provide long-lasting relief.

Ultimately, the claimant filed a workers compensation claim with respondent. Claimant attributes his upper back pain to the constant getting in and out of his vehicle 40 to 50 times a day to perform his job duties for respondent.

Claimant agreed that he played approximately 36 holes of golf a week. But claimant testified that playing golf did not increase the pain between his shoulder blades and instead would sometimes cause lower back pain above his hips.

Dr. John Dickerson attributed claimant's upper back pain to repetitive motion injury suffered at work. Dr. Dickerson did not relate the pain to the bulging disk because the pain is localized in the T5 region. But the doctor did conclude that claimant's symptoms are likely soft tissue in nature such as inflammation of cartilage or muscle tear or strain. Conversely, Dr. Amitabh Goel with the Wichita Clinic, P.A. opined that claimant's current symptoms were not related to a work injury. Dr. Larry K. Wilkinson reviewed claimant's medical records and opined that claimant's mechanism of injury, frequently getting in and out of his vehicle, is not a causative bio-mechanic factor and the doctor did not believe claimant's job was causing his back pain. He further opined that claimant's pain might be related to his golfing activities.

As previously noted, the ALJ ordered Dr. Stein to perform and independent medical examination of claimant. Ultimately, Dr. Stein concluded claimant's work was not the cause of his thoracic back pain but he did indicate that there was a reasonable likelihood that claimant's work activities irritated his upper back and increased his pain. In his report the doctor stated in pertinent part:

> In summary, I have no definitive diagnosis and no way to make one but have seen this type of pain before. I do not know if it was originally a result of his work activity, and can only state that this would be an unusual onset. In terms of causation, therefore, there is no relationship with work activity that can be documented within a reasonable degree of medical probability. There is, however, reasonable likelihood that the work activity is further irritating this area and increasing the pain. This is not necessarily a permanent aggravation as the symptoms improve when the activity is decreased. Eliminating the activity or keeping it to a minimum over a long period of time may result in considerable improvement.[5]

Dr. Stein went on to recommend permanent work restrictions:

> Permanent work restrictions are recommended for the purpose of diminishing the amount of upper back pain. Mr. Clark should avoid the one activity which appears

[5] Stein's IME Report at 6-7.

> to exacerbate his pain. I would recommend that he not serve papers at all for a period of two months and thereafter limit the serving of papers to no more than 10 per day. It might even be better if the work week could be extended to five days, keeping the same number of hours, and therefore reducing the number of deliveries per day.[6]

Claimant testified that his back pain would worsen through the work day. His work week was four days and on his three days off his back condition would progressively improve. Dr. Dickerson noted that the location of claimant's pain was above the bulging disk and thus that was not the cause of the upper back pain. But Dr. Dickerson concluded claimant likely had suffered soft tissue injury which he related to claimant's work. Although Dr. Stein concluded the work did not cause the condition, nonetheless, he did note that claimant's work activities irritated that condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[7] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[8]

It seems somewhat inconsistent for Dr. Stein to conclude that claimant's work activities did not cause his upper back pain but then conclude such activities are irritating the area and increasing the pain. Moreover, Dr. Stein's restrictions against claimant performing the very work that causes pain corroborates his determination that work is, at a minimum, aggravating his condition. This Board member finds the opinions of Drs. Dickerson and Stein support claimant's assertion that his work activities either caused or aggravated his upper back condition. Accordingly, this Board member finds claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[6] *Id.* at 7.

[7] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[8] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[9] K.S.A. 44-534a.

as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Thomas Klein dated August 21, 2006, is affirmed.

IT IS SO ORDERED.

Dated this 22nd day of November 2006.

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Robert G. Martin, Attorney for Respondent
Thomas Klein, Administrative Law Judge

[10] K.S.A. 2005 Supp. 44-555c(k).